

IN THE COURT OF APPEALS OF IOWA

FILED

AUG 29 1985

CLERK SUPREME COURT

31

DUANE EUGENE BRANT,)

Petitioner-Appellant,)

vs.)

STATE OF IOWA,)

Respondent-Appellee.)

Filed August 29, 1985

5-260
84-372

Appeal from the Iowa District Court for Black Hawk County - Roger F. Peterson, Judge.

Petitioner appeals from the district court's denial of his application for postconviction relief. He asserts that his guilty plea was not knowing, voluntary, and intelligent because his trial attorney did not advise him of the risks of pleading guilty. **AFFIRMED.**

Charles L. Harrington, Appellate Defender, and B. John Burns, Assistant Appellate Defender, for petitioner-appellant.

Thomas J. Miller, Attorney General, and Sherie Barnett, Assistant Attorney General, for respondent-appellee.

Considered by Donielson, P.J., and Snell and Hayden, JJ.

SNELL, J.

In 1976, defendant was charged with murder. The trial information charged that defendant:

did aid and abet in the murder of Mark Allen Combs, said murder being perpetrated in the course of a robbery of Mark Allen Combs at the Quick-Trip Store located at 3012 Ansborough Avenue; contrary to and in violation of Section 690.2 of the 1975 Code of Iowa.

The minutes attached to the information and additional minutes revealed that defendant and an accomplice left a bar together on the evening of June 3, 1976. The minutes also reveal that an eyewitness was in the Ansborough Quick Trip on the night of June 8. He observed a man armed with a shotgun enter the store and shoot Mark Allen Combs in the head with the shotgun. As the eyewitness ran from the store, he observed a car leave from the rear of the store. He later identified the armed man to be defendant's accomplice.

The minutes additionally show that defendant was the owner of the car observed at the scene and the owner of a shotgun similar to the one used in the murder. Defendant carried the shotgun concealed in his car. Furthermore, the minutes state that defendant and the accomplice confessed the murder to a number of persons--close friends and family members.

Defendant's case was set for jury trial in Winneshiek County. Defendant's counsel, James C. Dunbar, filed a motion in limine to determine the admissibility of testimony from the accomplice's parents to whom the accomplice had confessed. The court ruled that the testimony was admissible. Just before trial, Dunbar also learned that the State was able to bring back a witness to whom defendant had confessed under the out-of-state witness compact. After the jury was impaneled, Attorney Dunbar was convinced that the jury would return a first-degree murder verdict against defendant.

Because of the foregoing developments immediately before the trial was to commence, Dunbar advised defendant to plead guilty in the hope that the trial court would be a more sympathetic trier of facts.

Defendant entered a plea of guilty to an open charge of murder. After the degree of guilt hearing, the trial court found defendant guilty of first-degree murder and sentenced him to life in prison. On appeal, the supreme court remanded the case for a new finding based on the degree of guilt record previously made. Defendant was again found guilty of first-degree murder and given a life sentence. This judgment was also appealed and the supreme court affirmed. Additionally, the supreme court found that defendant understood the nature of the charge against him and the consequences of his plea. State v. Brant, 268 N.W.2d 210, 211 (Iowa 1978), aff'd following remand, 295 N.W.2d 434 (Iowa 1980).

Defendant filed a petition for postconviction relief asserting that he was denied effective representation at trial. Defendant contends Dunbar misinformed him about the necessity for and consequences of the guilty plea. Defendant testified at the postconviction hearing that he was scared into his guilty plea because of Dunbar's prediction of a first-degree murder jury verdict. Defendant admitted that Dunbar did not promise or guarantee a more favorable result with the guilty plea. However, defendant testified that Dunbar indicated a judge would not give a life term to anyone not actually committing the killing. This left defendant and his family with the impression that a guilty plea would result in a term of some years rather than a life sentence. The district court denied petitioner's application for postconviction relief.

When a defendant relies on a specific act or omission to prove ineffective assistance of counsel, two conditions must be demonstrated: 1) counsel failed to perform an essential duty, and 2) prejudice resulted therefrom. State v.

Miles, 344 N.W.2d 231, 234 (Iowa 1984). The ultimate test is whether under the entire record and totality of the circumstances counsel's performance was within the range of normal competency. Meier v. State, 337 N.W.2d 204, 206 (Iowa 1983); Hinkle v. State, 290 N.W.2d 28, 30 (Iowa 1980).

The test for ineffective assistance was most recently set forth in Strickland v. Washington, ____ U.S. ____, 104 S. Ct. 2052, 80 L. Ed. 2d 874 (1984). In that case, the Court stated: "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine the confidence in the outcome." Id. at ____, 104 S. Ct. 2068, 80 L. Ed. 2d at 698 (1984). The defendant must satisfy this burden by a preponderance of the evidence and rebut the presumption of counsel's competence. Meier, 337 N.W.2d at 206.

The United States Supreme Court held in Tollett v. Henderson, 411 U.S. 258, 93 S. Ct. 1602, 36 L. Ed. 2d 235 (1973), that when a criminal defendant, on advice of counsel, has admitted in open court he is guilty of a charged offense, he may not thereafter raise independent claims relating to deprivation of constitutional rights antedating the plea. He may only attack the voluntary and intelligent character of the plea by showing counsel's advice was outside the range of competence demanded of attorneys in criminal cases. Id. at 243; see also Long v. Brewer, 253 N.W.2d 549, 553 (Iowa 1977).

Defendant asserts that his guilty plea was not intelligently or voluntarily entered because of inadequate advice by Dunbar regarding the probability of a first-degree murder verdict by the jury. Defendant contends that Dunbar was erroneous in advising defendant that the testimony of his accomplice's parents would be admissible, that a diminished responsibility defense could

be used, and that because defendant did not personally commit the killing, he would not receive a life sentence.

Under the facts of this case, we cannot say that Dunbar's advice fell below the range of normal competency. Dunbar testified during the postconviction hearing that there were several elements which caused him to suggest the change from a jury trial to a guilty plea. These elements were the results of defendant's psychiatric examination which would not assist in the diminished responsibility defense, the availability of another witness to whom the defendant had confessed, the ruling by the trial court that his accomplice's parents could testify, and the extremely hostile jury.

In our view the defendant's plea of guilty was based on reasonably competent advice and is not open to attack on the ground that Dunbar misjudged the admissibility of evidence or the availability of a defense. We follow the view so aptly stated by the United States Supreme Court in Tollett:

The principal value of counsel to the accused in a criminal prosecution often does not lie in counsel's ability to recite a list of possible defenses in the abstract, nor in his ability, if time permitted, to amass a large quantum of factual data and inform the defendant of it. Counsel's concern is the faithful representation of the interest of his client, and such representation frequently involves highly practical considerations as well as specialized knowledge of the law. Often the interests of the accused are not advanced by challenges that would only delay the inevitable date of prosecution, see *Brady v. United States*, supra, at 751-752, 25 L. Ed. 2d 747, or by contesting all guilt, see *Santobello v. New York*, 404 U.S. 257, 30 L. Ed. 2d 427, 92 S. Ct. 495 (1971). A prospect of plea bargaining, the expectation or hope of a lesser sentence, or the convincing nature of the evidence against the accused are considerations that might well suggest the advisability of a guilty plea. . . .

Tollett, 411 U.S. at 267-268, 93 S. Ct. at 1608, 36 L. Ed. 2d at 243-244.

Dunbar's evaluation of the evidence against the defendant coupled with the new developments just prior to trial convinced him that the best strategy would be for the defendant to enter a guilty plea in the hope of receiving a

more favorable reaction from the judge as to the degree of guilt and sentence imposed. Dunbar's conclusion as to the desirability of a guilty plea was not beyond the range of competence demanded of attorneys as to constitute ineffective assistance of counsel.

AFFIRMED.